

1 **NOT FOR PUBLICATION**

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6 CLERK, U.S. BANKRUPTCY COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
8 BY _____ DEPUTY

9 UNITED STATES BANKRUPTCY COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re
12 CHARLES DOUGLAS FREELAND,
13 Debtor.

Bankruptcy No. 02-01651-JM
Adversary No. 03-90064-JM

14 APM PROFIT SHARING TRUST;
15 PHILLIP G. LARSON, TRUSTEE,
16 Plaintiff,
17 v.
18 CHARLES DOUGLAS FREELAND,
19 Defendant.

NOTICE OF DECISION

20
21 I
22 **PROCEDURAL BACKGROUND**

23 Charles Douglas Freeland ("Debtor") filed a petition to commence
24 a Chapter 11 case on February 15, 2002, to stay a pending foreclosure
25 of his home. After the house was sold, the case was converted to one
26 under Chapter 7 on August 2, 2002. The deadline to file complaints
27 under Section 523(a)(2) expired on November 8, 2002. On February 14,
28 2003, APM Profit Sharing Trust ("Plaintiff") filed this complaint to

1 determine the dischargeability of a stipulated judgment entered
2 against the Debtor in a California State Court on July 11, 2000
3 ("Judgment"). The Debtor filed a motion to dismiss the complaint on
4 March 14, 2003. The Court denied that motion after a hearing on April
5 24, 2003, after finding that the notice given to Plaintiff was
6 inadequate to satisfy procedural due process.

7 On February 23, 2004, Plaintiff filed a motion for summary
8 judgment as to the \$150,000 portion of the Judgment that was allocated
9 to the two fraud claims alleged in the state court complaint based on
10 principles of collateral estoppel. After various stipulations and
11 continuances, Debtor responded and filed a cross motion for summary
12 judgment on the grounds that the nondischargeability complaint was not
13 timely filed.

14 After a hearing on cross-motions for summary judgment, the
15 Plaintiff's motion was granted and Debtor's motions were denied and
16 a judgment was entered on December 10, 2004. The Debtor appealed.
17 The District Court issued a decision which affirmed the Bankruptcy
18 Court decision regarding the application of collateral estoppel as to
19 the Judgment, but vacated the Bankruptcy Court's judgment and remanded
20 the matter for factual findings on the adequacy of the notice.

21 After an evidentiary hearing, the matter was taken under
22 submission as of February 8, 2006. For the reasons set forth below,
23 the Court finds Plaintiff was provided with adequate notice of the
24 case and the complaint will be dismissed as untimely.

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II

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FACTS

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Mr. Larson is the Trustee for, and a beneficiary of the

1 Plaintiff, APM Trust. The address for both Plaintiff and Mr. Larson
2 is 176 Encinal Avenue, Atherton, California. The Debtor's original
3 Chapter 11 schedules listed Mr. Larson as a creditor with an incorrect
4 address in St. Louis, Missouri. When the original schedules were
5 prepared, the Debtor was in West Virginia caring for his parents who
6 both had cancer. His secretary gathered the information from his desk
7 to prepare the schedules and found the St. Louis address in the APM
8 file. The address actually was that of a partner of the Debtor. The
9 Debtor did not notice the error at the time of the filing.

10 After the case was converted, the Debtor reviewed the schedules
11 and found some errors in addresses and some additional creditors. He
12 gave the corrected information to his attorney, Barry Ruderman, who
13 then prepared the necessary documents and filed amended schedules on
14 October 9, 2002. The amendment included the correct address for Mr.
15 Larson. According to the certificate of mailing from Barry Ruderman's
16 office, a Notice to Creditors added by Amendments was sent to Mr.
17 Larson on that date, which included a copy of the Notice of Deadlines
18 ("Notice"). The Notice was sent to Mr. Larson exactly 30 days before
19 the deadline to file a complaint under § 523(a)(2) expired on November
20 8, 2002.

21 Mr. Larson testified that he did not receive the notice and did
22 not learn that the Debtor had filed a bankruptcy petition until he was
23 contacted by another creditor on December 6, 2002. Beyond his
24 testimony, Mr. Larson submitted no other admissible evidence¹ to
25 establish that he did not receive the Notice sent by Mr. Ruderman's
26

27 ¹ As Exhibit 1, Plaintiff offered a letter from Mr. Larson to the Chapter 7 Trustee dated
28 December 19, 2002. Since the letter was not produced during discovery, the Court will not admit
Exhibit 1 as part of the record.

1 office. He did not request an extension of time to file a non
2 dischargeability complaint, and this complaint was not filed until
3 February 14, 2003.

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5 III

6 DISCUSSION

7 The Court finds the testimony of all the witnesses to be
8 credible, and the decision rests upon the burden of proof as allocated
9 by case law. When mail is properly addressed, stamped and deposited
10 in the mail system, a presumption arises that it was received by the
11 party to whom it was sent. In re American Properties Inc., 30 B.R.
12 247, 250 (Ks. 1983). Proof of the custom of mailing is sufficient to
13 carry the burden of proper mailing, and the mailing employee need not
14 testify. Id.

15 In this circuit, the appellate courts have determined that the
16 denial of receipt of a properly mailed notice is not sufficient to
17 rebut the presumption of receipt. In re Bucknum, 951 F.2d 204, 207
18 (9th Cir. 1991); In re Ricketts, 80 B.R. 495, 497 (9th Cir. BAP 1987).
19 The party denying receipt must provide more positive evidence of an
20 objective nature to overcome the presumption of receipt. In re
21 Williams, 185 B.R. 598, 600 (9th Cir. 1995).

22 Without additional objective evidence beyond his own testimony,
23 Mr. Larson has not overcome the presumption that he received the
24 Notice that was properly addressed and mailed to him on October 9,
25 2002. Under the case of In re Dewalt, 961 F.2d 848 (9th Cir. 1992),
26 30 days notice should be sufficient since that is the amount of notice
27 required by BR 4007(c). The court also indicated that "even 30 days
28 notice may not be enough if truly extraordinary circumstances are

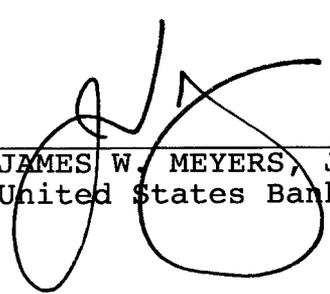
1 presented, as when an unsophisticated creditor, not represented by
2 counsel, receives only the most sketchy notice that a bankruptcy has
3 been filed. On the other hand, a somewhat lesser period may be
4 sufficient where there is clear evidence the creditor has enough
5 advance knowledge of the bar date to file the complaint or request an
6 extension and has purposefully chosen to lie in wait rather than
7 present its claim." DeWalt, 961 F.2d at 851. As in DeWalt, neither
8 extreme exists in this case. As a result, 30 days notice is
9 sufficient for the creditor to file a complaint or request an
10 extension by the deadline set forth in the Notice as imposed by B.R.
11 4007(c). Due process as defined in this circuit was met, and failure
12 to meet the deadline subjects the complaint to dismissal.

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14 IV

15 CONCLUSION

16 Plaintiff did not meet its burden to overcome the presumption of
17 receipt of the properly mailed Notice. The complaint filed by
18 Plaintiff was untimely and should be dismissed. Debtor's counsel is
19 instructed to submit a proposed judgment within fourteen days of the
20 filing of this Notice of Decision.

21 Dated: JUN 9 2006

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25 JAMES W. MEYERS, Judge
26 United States Bankruptcy Court
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